



Appellant-defendant Kerry Smith challenges the six-year sentence that was imposed following his guilty plea to Operating a Motor Vehicle While Privileges are Forfeited for Life,<sup>1</sup> a class C felony, and Operating a Vehicle While Intoxicated and Endangering a Person,<sup>2</sup> a class A misdemeanor. Specifically, Smith argues that the trial court abused its discretion when it sentenced him in excess of the four-year advisory sentence for a class C felony. In addition, Smith contends that the sentence is inappropriate in light of the nature of the offenses and his character. Finding no error, we affirm.

### FACTS

On January 18, 2008, Smith was arrested in Delaware County after failing standard field sobriety tests and taking a portable breath test with a result of .12%. Appellant's App. p. 17. On January 28, 2008, the State charged Smith with Count I, operating a motor vehicle while privileges are forfeited for life, a class C felony; Count II, operating a vehicle while intoxicated and endangering a person, a class A misdemeanor; Count III, operating a vehicle with a BAC of .08 or more, a class C misdemeanor; and the habitual substance offender enhancement.

On May 15, 2008, Smith entered into a plea agreement in which he pleaded guilty to counts I and II, in exchange for the State's dismissal of counts III and IV. Sentencing was left to the discretion of the trial court, except Smith agreed that at least one year of his sentence would be executed.

---

<sup>1</sup> Ind. Code § 9-30-10-17.

<sup>2</sup> I.C. § 9-30-5-2(a) and -2(b).

At Smith's sentencing hearing, which commenced on July 21, 2008, the trial court determined that Smith's lengthy criminal history was a significant aggravating factor. In mitigation, the trial court gave Smith's guilty plea some weight. In addition, Smith's long history of alcohol dependence was assigned minimal to no mitigating weight. Furthermore, Smith's positive involvement in various community projects was given minimal, but not significant, weight because Smith had failed to use these projects as a rehabilitation aid.

Similarly, Smith's support system of friends and community members was given only minimal weight because he had this support system in the past and failed to take advantage of it. Finally, the trial court gave minimal mitigating weight to Smith's law-abiding life from 1996 to 2008, when the instant offenses were committed, but noted that prior to 1996, he had a very serious criminal record that included identical offenses to the present offenses. After concluding that the aggravating factors outweighed the mitigating factors, the trial court sentenced Smith to a term of six years imprisonment on count I to be served concurrent with a term of one year imprisonment on count II, for an aggregate term of six years imprisonment. Smith now appeals.

## DISCUSSION AND DECISION

### I. Abuse of Discretion

Smith argues that his six-year sentence was an abuse of discretion. Specifically, Smith contends that the trial court abused its discretion by failing to give his guilty plea substantial mitigating weight.

We initially observe that sentencing decisions rest within the trial court's sound discretion and are reviewed on appeal only for an abuse of that discretion. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (2007). Trial courts are required to enter sentencing statements whenever imposing a sentence for a felony offense. 868 N.E.2d at 490. The statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. Id. If the recitation includes the finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating factors and explain why each circumstance has been determined to be mitigating or aggravating. Id. A trial court may abuse its discretion by entering a sentencing statement that includes reasons for imposing a sentence not supported by the record, omits reasons clearly supported by the record, or includes reasons that are improper as a matter of law. Id. at 490-91.

Smith cites to our Supreme Court's decision in Scheckel v. State, 655 N.E.2d 506 (Ind. 1995), to support his claim that his guilty plea should have been given more mitigating weight. However, Smith's argument is misplaced. In 2005, the General Assembly revised Indiana's sentencing scheme, replacing the "presumptive" sentencing scheme with an "advisory" sentencing scheme. Anglemyer, 868 N.E.2d at 487-88. In so doing, the General Assembly eliminated the requirement that trial courts consider certain mandatory circumstances when determining the sentence to be imposed and included a nonexhaustive list of aggravating and mitigating circumstances that trial courts "may consider." Ind. Code. § 35-38-1-7.1.

In Anglemyer, our Supreme Court addressed the impact of the “advisory” sentencing scheme on appellate review. 868 N.E.2d at 490. Specifically, our Supreme Court stated that “[b]ecause the trial court no longer has any obligation to ‘weigh’ aggravating and mitigating factors against each other when imposing a sentence, . . . a trial court cannot now be said to have abused its discretion in failing to ‘properly weigh’ such factors.” Id. at 491. Thus, Smith’s argument must fail.

## II. Inappropriate Sentence

Smith contends that the six-year aggregate sentence is inappropriate in light of the nature of the offenses and his character pursuant to Indiana Appellate Rule 7(B). In reviewing a Rule 7(B) appropriateness challenge, we defer to the trial court. Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). Our Supreme Court has recently further articulated the role of appellate courts in reviewing a 7(B) challenge:

Ultimately the length of the aggregate sentence and how it is to be served are the issues that matter. . . . And whether we regard a sentence as appropriate at the end of the day turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case. . . . There is thus no right answer as to the proper sentence in any given case. As a result, the role of an appellate court in reviewing a sentence is unlike its role in reviewing an appeal for legal error or sufficiency of evidence. . . .

The principal role of appellate review should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived “correct” result in each case. In the case of some crimes, the number of counts that can be charged

and proved is virtually entirely at the discretion of the prosecution. For that reason, appellate review should focus on the forest—the aggregate sentence—rather than the trees—consecutive or concurrent, number of counts, or length of the sentence on any individual count.

Cardwell v. State, 895 N.E.2d 1219, 1224-25 (Ind. 2008) (footnotes omitted).

Indiana Code section 35-50-2-6 provides that “[a] person who commits a Class C felony shall be imprisoned for a fixed term of between two (2) and eight (8) years, with the advisory sentences being four (4) years.” Here, Smith was sentenced to six years, which is two years more than the advisory sentence.

As for the nature of the offense, Smith was driving at time he knew his license had been forfeited for life. Even more compelling, Smith was driving while intoxicated, thereby presenting a danger not only to himself, but also to other motorists.

As for Smith’s character, the trial court observed that “prior criminal history and his prior opportunities for rehabilitation indicate an executed, enhanced sentence to the Department of Corrections [sic] is appropriate.” Appellant’s App. p. 10. Specifically, as a juvenile, Smith was adjudicated a delinquent for theft. Id. at 79. In 1984, Smith pleaded guilty to criminal mischief, a class B misdemeanor. In 1986, Smith pleaded guilty to operating a vehicle while intoxicated, a class A misdemeanor, and in 1988, he pleaded guilty to public intoxication, a class B misdemeanor. Id. at 79-80.

Smith’s criminal record continues to 1989, when he again pleaded guilty to operating a vehicle while intoxicated, a class A misdemeanor. Less than one month later, Smith pleaded guilty to operating a vehicle with a blood alcohol content of .10 or more with a prior conviction, a class D felony. Id. at 80. Less than two months later, Smith

pleaded guilty to operating a vehicle while intoxicated with a prior conviction, a class D felony.

In 1991, Smith was charged with operating a vehicle while suspended, a class D felony. He failed to appear at his hearing, but eventually pleaded guilty in 1993. Id. at 81. In March 1993, Smith pleaded guilty to operating a vehicle while intoxicated with a prior conviction, a class D felony, and in November 1993, he pleaded guilty to operating a vehicle while suspended as a HTV, a class D felony. Id. at 81-82.

Nearly a year and a half passed when, in June 1995, Smith pleaded guilty to public intoxication, a class B misdemeanor. In January 1996, Smith pleaded guilty to operating a vehicle after a lifetime suspension, a class C felony. A few months later, Smith pleaded guilty to operating a vehicle while intoxicated, a class A misdemeanor. Id. at 82. The instant offenses were committed in January 2008.

Notwithstanding his lengthy criminal history, Smith points out that there was no personal or property damage, he has attended group meetings for his alcoholism, he pleaded guilty, and he had lived a law-abiding life from 1996 until he committed the present offenses in 2008. However, given the extensive nature of Smith's prior history of alcohol-related offenses, we find this argument unpersuasive. Smith has failed five different substance abuse programs, id. at 87, and his continued involvement in alcohol-related offenses indicates that he is likely to reoffend.

As for his guilty plea, our Supreme Court has stated that "a guilty plea may not be significantly mitigating when it does not demonstrate the defendant's acceptance of responsibility, or when the defendant receives a substantial benefit in return for the plea."

Anglemyer, 875 N.E.2d at 221 (citations omitted). As stated above, Smith has apparently pleaded guilty to every offense for which he has been convicted, yet he continues to reoffend. This indicates that Smith has not taken responsibility for his actions. Moreover, Smith received a substantial benefit in return for his guilty plea in light of the sentence that he received and the State's dismissal of the remaining charges.

In sum, the nature of the offenses cannot be said to be minor in light of the fact that Smith was driving a vehicle while intoxicated and after receiving a lifetime suspension. Moreover, Smith's lengthy criminal history is a negative reflection of Smith's character. Therefore, given the totality of the nature of the offenses and Smith's character, we cannot conclude that his sentence is inappropriate.

The judgment of the trial court is affirmed.

NAJAM, J., and KIRSCH, J., concur.